Supreme Court, U.S.
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No.

In the Supreme Court of the United States

THE REPUBLIC OF ARGENTINA,
BANCO DE LA NACIÓN ARGENTINA,
Petitioners,

v.

EM LTD., NML CAPITAL, LTD.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether in cases where jurisdiction is predicated on the Foreign Sovereign Immunities Act of 1976 ("FSIA"), federal courts should apply federal common law choice of law rules, as held repeatedly by the Ninth Circuit, or the forum state's choice of law rules, as repeatedly held by the Second Circuit, including in this case, and by other circuits?

LIST OF PARTIES

The petitioners in this case are the Republic of Argentina (Defendant-Appellant below) and Banco de la Nación Argentina (Interested Non-Party-Appellant below). The respondents are EM Ltd. and NML Capital, Ltd. (Plaintiff-Appellees below).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Republic of Argentina (the "Republic") and Banco de la Nación Argentina ("BNA") respectfully pray that this Court grant a writ of certiorari to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The summary order of the court of appeals (App. at 1a) is published at 2010 WL 3001777 (2d Cir. Aug. 3, 2010). The slip opinion of the district court (App. at 14a) is published at 2009 WL 2568433 (S.D.N.Y. Aug. 18, 2009).

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant statutory provision, 28 U.S.C. § 1610(a) & (d), is set forth at App. at 33a.

STATEMENT OF THE CASE

The instant case arises under the FSIA and concerns execution upon the assets of an Argentine trust (the "BH Trust"), which was created under Argentine law and settled in Argentina exclusively among Argentine parties. Plaintiffs, who sought and

obtained the orders in aid of execution, are *not* creditors of the Trust, but judgment creditors of the Republic who refused to participate in the Republic's global debt restructuring process. Plaintiffs argued that the BH Trust, whose corpus is comprised principally of certain American Depository Shares (the "ADSs"), could be disregarded and its assets deemed attachable property of the Republic "in the United States" being "used for a commercial activity in the United States." 28 U.S.C. § 1610(a) & (d). The court of appeals' acceptance of plaintiffs' position included the court's application of both New York choice of law rules and New York substantive law to disregard the BH Trust, notwithstanding that jurisdiction over the action was based upon the federal FSIA and the trust itself explicitly provides that it is governed by Argentine law. By resorting to the forum state's choice of law rules – as opposed to applying federal common law choice of law principles – the decision below exacerbated a preexisting and recurring split among the circuits on this issue under the FSIA. *Compare, e.g.*, App. 7a (quoting *Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 959 (2d Cir. 1991) ("[T]he FSIA implicitly requires courts to apply the choice of law provisions of the *forum state* with respect to all issues governed by state substantive law.") (emphasis added)), *with Liu v. Republic of China*, 892 F.2d 1419, 1426 (9th Cir. 1989) ("*federal* common law provide[s] the appropriate choice of law rule in cases arising under the FSIA") (emphasis added).

Under federal common law choice of law principles, a trust instrument is "construed in accordance with the rules of construction of the state designated for this purpose in the instrument." Restatement (Second)

of Conflict of Laws § 268. There was and can be no dispute that the BH Trust is a valid trust as a matter of Argentine law. App. 8a. Thus, had the court of appeals applied this federal choice of law rule and hence Argentine substantive law – *viz.*, the law designated in the underlying trust instrument – the court could not have disregarded the BH Trust. However, rather than applying Argentine law to the BH Trust, as envisaged under both the federal choice of law rules and the underlying trust instrument, the court of appeals compounded a multi-circuit split by looking to New York choice of law principles and applying New York's "public policy" exception to respecting the trust form. *Id. See generally Dumont v. Saskatchewan Gov't Ins. (SGI)*, 258 F.3d 880, 886 (8th Cir. 2001) ("In a FSIA case, 'there is no clear understanding as to whether the forum state's choice-of-law rules should apply or whether federal common law should govern'") (quoting 14A Charles Alan Wright & Arthur R. Miller, *Federal Prac. & Proc.* § 3662 (3d ed. 1998)). The uncertainty created by this circuit split on an important and recurring question of federal law is long overdue for settlement by this Court.

A. Background

The present case arises from the Republic's issuance of global bonds during the 1990s (the "Bonds"), when the Republic "enacted a series of structural reforms" that successfully "recast the basis of public finance" and were widely praised as a model for free market reforms in developing countries. World Bank, ARGENTINA: FROM INSOLVENCY TO GROWTH 12 (1993). Following the international financial crisis of 1998, however, the Republic fell into a deep recession and experienced the worst economic catastrophe of its

modern history. *See generally* Paul Blustein, AND THE MONEY KEPT ROLLING IN (AND OUT): WALL STREET, THE IMF, AND THE BANKRUPTING OF ARGENTINA (2005). "The dramatic economic collapse in Argentina, culminating in 2002, resulted in the deepest political and economic crisis in generations. Few countries have experienced such economically catastrophic events."[1] By the end of 2001, this crisis made it impossible for the Republic to service its overwhelming debt burden – some $80 billion in public external debt alone – while maintaining basic governmental services necessary for the health, welfare, and safety of the Argentine people.[2] "[U]nable to service its debt," the Republic was forced to defer interest and principal payments to its bondholders, and seek a voluntary restructuring of

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[1] Carlos G. Fernández Valdovinos, *Growth, Poverty, and Social Equity in Argentina*, World Bank Newsletter, No. 82, November 2005, at 1, *available at* http://siteresources.worldbank.org/INTENBREVE/Newsletters/20847679/82-NOV05-AR_Growth.pdf (last visited Oct. 26, 2010). The Argentine crisis has been described as the "worst-case scenario" in eight centuries of financial crises throughout the world. *See* Carmen M. Reinhart & Kenneth S. Rogoff, *This Time is Different: A Panoramic View of Eight Centuries of Financial Crises* (2008), *available at* http://www.economics.harvard.edu/files/faculty/51_This_Time_Is_Different.pdf (last visited Oct. 26, 2010).

[2] *See, e.g.*, Ross P. Buckley, *The Bankruptcy of Nations: An Idea Whose Time Has Come*, 43 INT'L LAW. 1189, 1196 (2009) (describing Argentina's economic crisis: "The living standards of over one-half of the Argentine people fell below the poverty line, and over a third could not afford basic food. Children were fainting in class from hunger, regularly. Adults were rioting and breaking into supermarkets, regularly, in search of food. UNICEF Argentina was concerned that stunted growth and reduced mental capacities would be the long-term consequence of this economic crisis for millions of the nation's children.").

its crippling debt burden. Panel of Independent Advisors, *Economic and Financial Issues Facing Argentina*, IMF News Brief No. 02/80, July 29, 2002, ¶ 1, *available at* http://www.imf.org/external/np/sec/nb/2002/nb0280.htm (last visited Oct. 26, 2010).

B. The Public Trusts and the BH Trust

Long before the Republic defaulted on the Bonds that are the subject of the underlying actions by the plaintiffs against the Republic, the Argentine Congress as part of a program of free market reforms implemented a plan to privatize a state-owned bank, Banco Hipotecario Nacional, by organizing a stock company, Banco Hipotecario S.A. Shares of Banco Hipotecario S.A. were sold to the public and the proceeds used to finance public works projects in Argentina. As part of this plan, the Argentine Congress passed Law No. 24,855 in July 1997 creating the "Infrastructure Trust" as a public trust to evaluate and fund proposed public infrastructure projects. In September 1997, Decree No. 924/97 was enacted, creating a second public trust, the "Assistance Trust," to assist in the capitalization of the Infrastructure Trust so that the Infrastructure Trust would have the necessary funding to finance the projects. (The Assistance Trust, together with the Infrastructure Trust, are collectively referred to as the "Public Trusts.") BNA, a state-owned Argentine commercial bank and an interested non-party appellant below, was designated trustee of both Public Trusts.

After creating the Public Trusts, the Argentine government promulgated a decree in 1998 pursuant to which Banco Hipotecario S.A. established the BH Trust, an Argentine trust, to acquire and hold Class D

shares of Banco Hipotecario S.A. in the form of ADSs. The trust agreement creating the BH Trust was executed in February 1999 among an Argentine trustor, Banco Hipotecario S.A.; an Argentine trustee, First Trust of New York, National Association, Argentine Permanent Representation (the "Argentine Trustee"); and BNA in its capacity as trustee of the Assistance Trust and Infrastructure Trust, which are respectively the beneficiary and residual beneficiary of the BH Trust. The trust agreement provides that Argentine law governs the BH Trust.

The corpus of the BH Trust consists mainly of the ADSs, which belong to the Argentine Trustee on behalf of the BH Trust. In connection with attachment orders obtained by plaintiffs in May 2007, U.S. Bank Trust provided a garnishee's statement in which it identified a New York securities account containing 9,090,500 ADSs, each ADS representing ten Class D shares of Banco Hipotecario, S.A.[3] The ADSs "corresponded to unexercised options," App. 17a, and had been sitting, unused, for more than three years when the district court issued the May 2007 attachment orders.

C. Respondents EM Ltd. ("EM") and NML Capital, Ltd. ("NML")

Plaintiffs EM and NML are "vulture funds," distressed debt buyers that acquired beneficial interests in the Bonds at a deep discount both

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[3] First Trust of New York National Association changed its name to U.S. Bank Trust National Association in 1998, but at all times relevant here it has operated in Argentina under the name First Trust of New York National Association, Argentine Permanent Representation.

immediately before, and well after, the Republic suspended payments on its unsustainable external debt in December 2001. EM/NML and similar hedge funds seek to take advantage of the absence of bankruptcy protection in the sovereign context to bring lawsuits for the face value of defaulted sovereign debt, obtain judgments on which interest continues to run indefinitely and then try to execute on them.[4]

EM is a Cayman Islands corporation wholly owned by Dart Capital Ltd., which is in turn controlled by Kenneth Dart, a former U.S. citizen who was behind litigation that tried to interfere with Brazil's restructuring in the 1990s. *See CIBC Bank & Trust Co. (Cayman) Ltd. v. Banco Central do Brasil*, 886 F.

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[4] *See, e.g.*, Press Release, Office of the High Commissioner for Human Rights, *'Vulture Funds' – UN expert on foreign debt welcomes landmark law to address profiteering* (Apr. 20, 2010), *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9976&LangID=E (last visited Oct. 26, 2010) ("'[T]he profiteering of 'vulture funds' [has been] at the expense of both the citizens of distressed debtor countries and the taxpayers of countries that have supported international debt relief efforts . . . . 'Vulture funds' have exploited the voluntary nature of international debt relief schemes by acquiring defaulted sovereign debt at deeply discounted prices and then seeking repayment of the full value of the debt through litigation, seizure of assets or political pressure.'") (citation omitted); Jonathan C. Lippert, Note, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N.Y. INT'L L. REV. 1, 2, 27 (2008) (vulture funds seek "extraordinary profits at the expense of U.S. companies, the U.S. economy and U.S. foreign relations . . . potentially affecting debt restructuring in all emerging markets").

Supp. 1105, 1107-08 (S.D.N.Y. 1995).[5] NML, also a Cayman Islands corporation, is wholly owned by Elliott International, L.P., whose general partner is an affiliate of Elliott Associates, L.P. ("Elliott Associates"). Elliott Associates is well-known in the world of sovereign debt for its surprise attack on Peru's debt restructuring in 2000, when it obtained an *ex parte* order from a Brussels court enjoining Peru from making payments to other creditors under its Brady Plan debt restructuring based upon a novel and unprecedented interpretation under New York law of the boilerplate "*pari passu* clause." *See Elliott Assocs. L.P. v. Banco de la Nacion*, Cour d' Appel [CA] [Court of Appeals] Bruxelles, 8e ch., Sept. 26, 2000 (Belg.). Rather than risk falling into default on its new indebtedness, Peru settled with Elliott Associates, allowing it to reap enormous profits on the discounted debt it had purchased. *See* G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 BUS. LAW. 635, 636 (ABA Publ'ns Feb. 2001).[6]

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[5] Mr. Dart reportedly relinquished his U.S. citizenship for tax purposes, and is now a citizen of Belize and Ireland. *See* Jerry R. Dagrella, Note, *Wealthy Americans Planning to Renounce Their Citizenship to Save on Taxes Have a New Problem to Consider: This Time Congress Means Business*, 13 TRANSNAT'L LAW. 363, 364 (2000).

[6] In litigated proceedings involving another sovereign, Nicaragua, the Belgian courts subsequently denied the same type of order that Elliott Associates had earlier obtained *ex parte*. *Republic of Nicaragua v. LNC Invs. LLC*, Cour d' Appel [CA] [Court of Appeal] Bruxelles, 9e ch., Mar. 19, 2004, (Belg.). The United States, the Federal Reserve Bank of New York and The Clearing House Association LLC all submitted statements of interest or amicus briefs in earlier proceedings in the district court also rejecting Elliott Associates' erroneous view of the *pari passu* clause. *See*

EM and NML have used similar aggressive tactics in the case of Argentina. EM's parent acquired beneficial interests in the Bonds on November 21 and December 5, 2001, when those instruments were trading at a deep discount because of the general expectation that the Republic would be unable to service its debt as scheduled. NML, for its part, bought interests in Republic debt both immediately before and after the Republic's default. NML continues to speculate in Republic nonperforming debt, most recently allegedly purchasing more than $100 million of defaulted Bond interests in late 2008 and filing a new complaint against the Republic in February 2009. *See NML Capital, Ltd. v. Republic of Argentina*, No. 09-1708 (TPG) (S.D.N.Y. compl. filed Feb. 24, 2009).

Besides launching a series of execution attempts against purported property of the Republic that the federal courts have overwhelmingly rejected as violative of the FSIA,[7] these plaintiffs also sought to

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Amici Curiae of the Federal Reserve Bank of New York and the Clearing House Association, *Macrotecnic Int'l Corp. v. Republic of Argentina*, No. 02 Civ. 5932 (TPG) (S.D.N.Y filed Jan. 12, 2004) and Statement of Interest of the United States, *id.* (filed Jan. 13, 2004).

[7] *See Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 124, 130-31 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1691 (2010) (rejecting attempt by EM/NML and other vulture funds to execute upon Argentine social security funds because the Republic had not "used [the funds] for a commercial activity in the United States") (citing *EM I*, 473 F.3d at 481 n.19); *NML Capital, Ltd. v. Republic of Argentina*, No. 02 Civ. 3804 (TPG), 2005 WL 743086, at *3 (S.D.N.Y. Mar. 31, 2005) (vacating EM/NML's *ex parte* restraining and attachment orders concerning Bonds tendered by third parties in the Republic's 2005 exchange offer), *aff'd sub*

impede the Republic's debt restructuring efforts with its creditors: in March 2005, EM and NML tried to disrupt the settlement of the Republic's global exchange offer to creditors by attaching and restraining – again on an *ex parte* basis – nonperforming Bonds that had been tendered by their beneficial owners for new security entitlements. The district court granted the Republic's motion to vacate the *ex parte* attachment and restraining orders, and the Second Circuit affirmed the vacatur. *See EM Ltd. v. Republic of Argentina*, 131 F. App'x 745, 747 (2d Cir. 2005). The Republic's 2005 exchange offer was then able to proceed to settlement, as was the Republic's later 2010 exchange offer, resulting in the successful restructuring of 91% of the Republic's nonperforming

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nom., *EM Ltd. v. Republic of Argentina*, 131 F. App'x 745 (2d Cir. 2005); *NML Capital, Ltd. v. Republic of Argentina*, No. 04-cv-00197-CKK (D.D.C. Aug. 3, 2005) (vacating NML's *ex parte* attachments of diplomatic and military property in Washington, D.C. and Maryland). Courts outside of the United States have likewise rejected EM/NML's unlawful efforts to interfere with purported property of the Republic within their respective foreign jurisdictions. *See, e.g.*, *NML Capital, Ltd. v. Republic of Argentina*, Cour d' appel [CA] [regional court of appeal] Paris, 8e ch., Oct. 1, 2009 (Fr.) (affirming vacatur of attachments of bank accounts related to the Argentine Embassy in Paris because funds were immune diplomatic property); *Republic of Argentina v. NML Capital, Ltd.*, Tribunal de Première Instance [Civ.] [Tribunal of First Instance] Bruxelles, Nov. 12, 2009 (Belg.) (vacating attachments related to accounts of Argentine Embassy in Belgium); *Aerolinas Argentinas v. NML Capital, Ltd.*, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Dec. 1, 2009 (Fr.) (lifting attachments on Argentine state-owned airline because airline was not an "émanation" of the state that was liable for the state's debts).

debt.[8] EM/NML declined to participate in the restructuring process – the offer was equally available to them as to the Republic's other creditors – and continue aggressively to pursue litigation against the Republic and attempts to execute against purported Republic property.

D. The District Court Authorizes EM/NML to Attach the BH Trust's ADSs and the Republic's Purported Beneficial Interest, and the Court of Appeals Affirms

In May 2007, EM/NML sought and obtained *ex parte* attachment and restraining orders against the ADSs held by the BH Trust and the Republic's purported "beneficial interest" in the trust assets. In its August 18, 2009 opinion confirming those orders, the district court did not address the status of the BH Trust, but rather focused exclusively on whether the Republic had some attachable "beneficial interest" in the BH Trust vis-à-vis the Public Trusts. App. 31a-32a. There was no finding by the district court that the BH Trust was invalid under Argentine law, New York law

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[8] The United States, the international financial community and the federal courts have recognized the importance of voluntary sovereign debt restructuring. *See* Statement of Interest of the United States, *Macrotecnic Int'l Corp. v. Republic of Argentina*, No. 02 Civ. 5932 (TPG), at 2-6 (S.D.N.Y. filed Jan. 13, 2004); *H.W. Urban GmbH v. Republic of Argentina*, No. 02 Civ. 5699 (TPG), 2003 WL 21058254, at *2 (S.D.N.Y. May 12, 2003) ("[A]n important channel for attempting to resolve the Argentine debt problem will undoubtedly be the effort to negotiate a debt restructuring plan."); *cf. Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 855 (2d Cir. 1997) ("the United States encourages participation in, and advocates the success of, IMF foreign debt resolution procedures").

or any other law.[9] In fact, EM/NML's expert below *conceded* that the BH Trust was a valid trust as a matter of Argentine law. Thus, there was no finding by the district court that ADSs belonged to the Republic or any other entity other than the BH Trust.

The Republic and BNA appealed the district court's decision to the Second Circuit, which affirmed in its August 3, 2010 summary order. They asserted that reversal was required because, *inter alia*, the BH Trust was indisputably a valid trust under Argentine law, which was the governing law provided for by the underlying trust instrument. In response to this argument, EM/NML argued that the court of appeals should look to New York law to disregard the BH Trust under New York's "public policy" exception for "self-settled" trusts. The court of appeals accepted plaintiffs' argument, purporting to apply New York's choice of law "interests analysis," App. 8a, but failing to make any finding that New York had a greater interest than Argentina in the dispute over BH Trust – an Argentine law trust, settled in Argentina among solely Argentine parties. Nevertheless, after citing the New York choice of law rule, the court of appeals applied New York substantive law and held the BH Trust invalid. App. 8a-9a. It therefore held that the ADSs could be deemed property of the Republic.

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[9] The district court separately concluded, and the court of appeals affirmed, that the Public Trusts were not valid under Argentine or New York law. App. 25a, 9a-10a. But that ruling, whether correct or not (and Petitioners respectfully disagree with it), would not subject the property of the BH Trust to attachment, but would at most allow creditors to proceed against the Public Trusts' beneficial interests.

REASONS FOR GRANTING THE PETITION

I. THIS CASE SQUARELY PRESENTS AN ISSUE OVER WHICH THE COURTS OF APPEALS ARE DIVIDED: WHETHER THE FSIA REQUIRES FEDERAL COMMON LAW OR FORUM CHOICE OF LAW RULES.

There is a direct conflict in the courts of appeals – encompassing the Second, Ninth, Sixth and D.C. Circuits – over whether the FSIA requires a federal court to apply a federal common law choice of law rule or the forum state's rules. *Compare, e.g.*, App. 7a (citing *Barkanic v. Gen. Admin. of Civil Aviation of the P.R.C.*, 923 F.2d 957, 959 (2d Cir. 1991)), and *Brink's Ltd. v. S. African Airways*, 93 F.3d 1022, 1030 (2d Cir. 1996) (applying forum choice of law rule to case predicated on FSIA jurisdiction), *with, e.g.*, *Chuidian v. Philippine Nat'l Bank*, 976 F.2d 561, 564 (9th Cir. 1992) ("In this [FSIA] context, federal common law choice of law rules apply, not the choice of law rules of the forum state."), *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991) ("[J]urisdiction in this case is based on FSIA, not diversity. Therefore, federal common law applies to the choice of law rule determination.") (citation omitted), and *Liu*, 892 F.2d at 1426 ("[F]ederal common law provide[s] the appropriate choice of law rule in cases arising under the FSIA."), and *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 841 & n.2 (D.C. Cir. 2009) (D.C. Circuit adopting the rule in the Second Circuit and splitting with the Ninth Circuit), and *O'Bryan v. Holy See*, 556 F.3d 361, 381 n. 8 (6th Cir. 2009) (applying forum state choice of law rules in FSIA case).

This longstanding disagreement between the courts of appeals on an issue of fundamental importance calls out for this Court's review. *See also Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996) ("Demonstrably, the law is unsettled when it comes to applying either a federal common law choice of law rule or state choice of law principles in non-diversity cases.") (noting conflict between Second and Ninth Circuits); *Dammarell v. Islamic Republic of Iran*, No.Civ.A. 01-2224JDB, 2005 WL 756090, at *18 (D.D.C. Mar. 29, 2005) (same); *In re Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 926 F. Supp. 736, 739 (N.D. Ill. 1996) (same); *In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 870 F. Supp. 1293, 1336 n.61 (E.D. Pa. 1992) (same).

Because of this circuit split, foreign states subject to jurisdiction in U.S. courts under the FSIA, either as defendants or as purported owners of property faced with attachment or execution, face inconsistent standards on the basic issue of what choice of law rule controls the substantive laws to which the foreign states or their property will be subject. This split is especially provocative because of the need for nationally uniform standards under the FSIA. *E.g.*, *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) ("*Bancec*") ("When it enacted the FSIA, Congress expressly acknowledged the importance of developing a uniform body of law concerning the amenability of a foreign sovereign to suit in United States courts.") (internal quotation marks omitted); H.R. Rep. No. 94-1487, at 13, 32 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611, 6631, 6632 (noting Congress's intent to promote a "uniformity in decision" in "cases involving

foreign sovereigns" and Congress's concerns about "the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area").

This case squarely presents the circuit split. The Republic and BNA asserted that Argentine law should apply to the BH Trust as the law designated in the trust instrument. However, the court of appeals applied New York choice of law rules to determine the law governing the validity of the BH Trust for purposes of attachment of its assets, and under those rules, held that New York substantive law should control this issue. App. 7a-8a. Under New York law, the court then concluded that the ADSs were subject to attachment because it could disregard the BH Trust, based on New York's public policy exception for self-settled trusts. *Id.* at 8a-9a. If, instead, the court below had applied the applicable *federal* common law choice of law rule, as the Ninth Circuit would have done, Argentine substantive law would have governed as the law "of the state designated for this purpose in the instrument." Restatement (Second) of Conflict of Laws § 268. Under the law of the Ninth Circuit and federal common law choice of law rules, the Republic would have prevailed below, as there was no dispute that under Argentine law the ADSs were property of the BH Trust, *not* the Republic.

The inter-circuit conflict should be resolved by this Court in favor of a federal common law choice of law rule for federal courts exercising jurisdiction under the FSIA. The law defining what constitutes "property in the United States" for purposes of attachment and execution under the FSIA, as with other issues of choice of law in cases where subject matter jurisdiction

is based on the FSIA, cannot be left to the vagaries of state choice of law rules. The question of what constitutes "property in the United States" under the FSIA should be determined consistently by a uniform, federal common law choice of law rule, particularly given Congress's concerns over uniformity in suits against foreign states. Otherwise, a foreign state subject to a judgment registered in several districts across the country, for example, could face a multiplicity of results regarding what constitutes "property in the United States" and could receive conflicting immunity determinations for properties that are identically situated except for state boundary lines.

In *Bancec*, this Court described the circumstances in which the federal interest in uniformity in international relations and FSIA immunity determinations dictates that a federal court exercising jurisdiction under the FSIA apply federal common law instead of forum law, both as the choice of law rule and the substantive rule of decision. The *Bancec* Court rejected the argument that 28 U.S.C. § 1606's language "the foreign state shall be liable in the same manner and to the same extent as a private individual in like circumstances" required the application "of the law of the forum . . . including its conflict principles" to the issue in dispute. 462 U.S. at 622 n.11. The Court explained that while the FSIA required the application of a state law rule of liability governing private individuals to foreign states in like circumstances, "[t]he statute is silent, however, concerning the rule governing the attribution of liability among entities of a foreign state." *Id.* (emphasis added). The Court went on to state that in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964), it had declined to

apply the State of New York's version of the Act of State doctrine in a diversity action between a United States national and an instrumentality of a foreign state, concluding that matters bearing on the nation's foreign relations "should not be left to divergent and perhaps parochial state interpretations." *Bancec*, 462 U.S. at 622 n.11 (citation and internal quotation marks omitted). In thus applying federal common law both as the choice of law rule and the substantive rule of decision, the *Bancec* Court noted that "federal common law . . . in these circumstances is necessarily informed both by international law principles and by articulated congressional policies." *Id.* at 623.

Bancec's choice of law analysis under the FSIA, and its emphasis on the need for uniformity, apply equally here given the analogous issues of attribution of ownership interests in property "among entities of a foreign state" and the "amenability" of that property to execution in a U.S. court. *Id.* at 622 n.11 (emphasis omitted). Accordingly, this Court should grant certiorari and resolve the circuit split by holding that the FSIA requires the application of the federal common law choice of law rules rather than the rules of the state which happens to be the forum.[10]

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[10] Foreign-state immunity and foreign relations are among the narrow areas where this Court has appropriately recognized the need to create federal common law. *See Atherton v. FDIC*, 519 U.S. 213, 225, 226 (1997) (recognizing "relationships with other countries" as one of the "few and restricted instances in which this Court has created a federal common law") (citing *Sabbatino*, 376 U.S. at 425) (citation and internal quotation marks omitted); *Bancec*, 462 U.S. at 622 n.11 (rejecting New York choice of law and substantive law in favor of federal common law because of the need for uniformity under the FSIA); *Tex. Indus., Inc. v. Radcliff*

CONCLUSION

For the reasons set forth above, a writ of certiorari should be granted.

Materials, Inc., 451 U.S. 630, 641 (1981) ("[F]ederal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."); *Sabbatino*, 376 U.S. at 425-26 ("[R]ules of international law should not be left to divergent and perhaps parochial state interpretations. . . . [T]here are enclaves of federal judge-made law which bind the States."). While in many instances a federal common law choice of law rule may lead to adoption of state law as the federal rule of decision, *see, e.g., Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001), it would not do so here. In the context of a dispute over a trust, the federal choice of law rule requires application of the law designated in the underlying trust instrument and, unlike New York substantive law for self-settled trusts, there is no amorphous "public policy" exception to respecting the trust form under federal common law. *See* Restatement (Second) of Conflict of Laws § 268.

Respectfully submitted,

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